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BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 05-4769

TIME WARNER TELECOM, *ET AL.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA

Respondents

ON PETITIONS FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISISON

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STATEMENT OF JURISDICTION

The Federal Communications Commission issued the order on review on September 23, 2005. The petitions for review were filed within the time period set out in 28 U.S.C. § 2344. This Court has jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

STATEMENT OF ISSUES

The Communications Act distinguishes between "information service" (which is generally unregulated) and "telecommunications service" (which is subject to common carrier regulation). *See* 47 U.S.C. §§ 153(20), (46). The

Supreme Court recently held that the Federal Communications Commission reasonably classified cable modem service – a high-speed Internet access service provided over cable television systems – as a functionally integrated information service that does not include a separate telecommunications service. *National Cable & Telecommunications Ass'n v. Brand X Internet Services,* 125 S. Ct. 2688, 2702-10 (2005) ("*Brand X*"). The Court in *Brand X* also upheld the FCC's decision not to subject cable modem service providers to common carrier obligations under its *Computer Inquiry* rules, which had been adopted in the 1980s to address a market with fundamentally different characteristics. *Id.* at 2710-11.

The FCC decision that the Supreme Court affirmed in *Brand X* was merely the "first step in an effort to reshape the way the Commission regulates information-service providers." *Brand X,* 125 S. Ct. at 2711. In the order on review here, the Commission took the next logical step in developing a comprehensive and consistent regulatory framework for "broadband" (*i.e.*, high-speed) Internet access services. Having declined to impose common carrier requirements on providers of cable modem service – the leading providers of broadband Internet access by a wide margin – the Commission sensibly decided to extend the same treatment to phone companies that offer the same service over telephone wires (a service known as "wireline" broadband Internet access). *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities,* 20 FCC Rcd 14853 (2005) (JA) ("*Order*").

This case presents two issues:

(1) whether, consistent with the Supreme Court's *Brand X* decision, the FCC reasonably found that the transmission component of wireline broadband Internet access service does not fit the Communications Act's definition of "telecommunications service"; and

(2) whether, in response to changing circumstances, and in an effort to remove unnecessary regulatory impediments to innovation and investment, the Commission made a reasonable policy judgment that its *Computer Inquiry* requirements should no longer apply to wireline broadband Internet access services.

COUNTERSTATEMENT

For the last four decades, the Federal Communications Commission has grappled with difficult regulatory issues raised by the confluence of communications and data processing technologies. As those technologies and market conditions have changed over time, the Commission has periodically revised its regulatory approach to adapt to new developments. The order on review marks the latest chapter in the evolution of the FCC's policy concerning how – or whether – it should regulate the intersection between communications and data processing. The agency's action in this case can only properly be understood in the context of the FCC's efforts over the last 40 years to modify its rules to keep pace with ever-changing technologies and markets.

A. Regulatory Background

(1) The *Computer Inquiries*

When the use of computers dramatically expanded in the 1960s, computer users became "increasingly dependent upon communication common carrier

facilities and services."[1] At that time, local telephone companies – now known as incumbent local exchange carriers ("ILECs") – offered the only means of transmission for data processing services. Historically, the FCC had regulated the ILECs' offering of interstate communications service as common carriage under Title II of the Communications Act, 47 U.S.C. § 201 *et seq.*

Because "the growing convergence of computers and communications" raised "a number of regulatory and policy questions within the purview of the Communications Act," the FCC in 1966 launched an inquiry to determine whether developments in the computer industry warranted changes in the agency's policies.[2] That inquiry gave rise to a series of proceedings called the *Computer Inquiries*. Over the course of those proceedings, which spanned several decades, the FCC made numerous alterations in its policies in an ongoing effort to respond to changing technological and marketplace conditions.

In the initial *Computer Inquiry* (dubbed "*Computer I*"), the Commission instituted a "maximum separation" regime under which ILECs could provide data processing services "only through affiliates utilizing separate books of account, separate officers, separate operating personnel and separate equipment and facilities devoted exclusively to the rendition of data processing services."[3] The

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[1] *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, 7 FCC 2d 11 (¶ 1) (1966).

[2] *Ibid.* (¶ 2).

[3] *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, 28 FCC 2d 267, 270-71 (¶¶ 10, 12) (1971), *aff'd in part and rev'd in part, GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973).

agency adopted these "separation" requirements to prevent ILECs from using their control over bottleneck transmission facilities to gain an unfair advantage in the competitive data processing market.[4] At the same time, the Commission emphasized that it was not asserting regulatory authority over data processing *per se*.[5] It proposed to determine on a case-by-case basis whether "hybrid" service packages (combining communications and data processing features) should be categorized as unregulated data processing or regulated communications.[6]

Before long, technological breakthroughs blurred the boundary between communications and data processing, compelling the Commission to reconsider "the definitional structure used to distinguish regulated communications services from unregulated data processing services."[7] In 1980, as part of its *Second Computer Inquiry* ("*Computer II*"), the Commission established a new regulatory framework that distinguished between "basic service" and "enhanced service."[8] It "defined both basic and enhanced services by reference to how the consumer perceives the service being offered." *Brand X,* 125 S. Ct. at 2696-97.

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[4] *Id.* at 271 (¶¶ 13-15).

[5] *Id.* at 270 (¶ 11).

[6] *Id.* at 276-79 (¶¶ 26-34).

[7] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384, 391 (¶ 20) (1980) ("*Computer II Final Decision*"), *aff'd, Computer & Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[8] *Id.* at 417-23 (¶¶ 86-101).

The Commission in *Computer II* defined basic service as the offering of "a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information."[9] In other words, basic service was "limited to the common carrier offering of transmission capacity for the movement of information."[10] By contrast, enhanced service (as defined in *Computer II*) "combines basic service with computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information, or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information."[11] Simply put, the Commission defined an enhanced service as "any offering over the telecommunications network" that is "more than a basic transmission service."[12]

The classification of a service as "basic" or "enhanced" carried important regulatory consequences under the Communications Act. While the Commission declared that it would continue "applying traditional Title II mechanisms to basic services," it concluded that it lacked authority under Title II to regulate enhanced services because they are not common carrier communications services.[13] Insofar

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[9] *Computer II Final Decision*, 77 FCC 2d at 420 (¶ 96).

[10] *Id.* at 419 (¶ 93).

[11] *Id.* at 387 (¶ 5).

[12] *Id.* at 420 (¶ 97).

[13] *Id.* at 435 (¶ 131).

as the agency chose to regulate enhanced services, it said that it would rely on its "ancillary regulatory powers" under Title I of the Communications Act.[14]

The Commission also revisited its "maximum separation" policy. It decided to eliminate structural separation requirements "for all carriers except those under direct or indirect control of AT&T or GTE," the two largest telephone companies at the time.[15] On reconsideration, the FCC decided to exempt GTE from those requirements, leaving AT&T as the only carrier subject to structural separation.[16] After the Bell Operating Companies ("BOCs") – the nation's largest ILECs – were divested from AT&T in the early 1980s, the Commission required the BOCs to comply with structural separation requirements that were similar to those adopted in *Computer II*.[17]

Under *Computer II,* all ILECs, including those that were no longer subject to structural separation, were required to "acquire transmission capacity pursuant to the same prices, terms, and conditions reflected in their tariffs" whenever they used their own common carrier transmission facilities to provide enhanced services.[18]

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[14] *Ibid.* (¶ 132) (citing 47 U.S.C. § 151).

[15] *Id.* at 474 (¶ 228).

[16] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry),* 84 FCC 2d 50, 72-75 (¶¶ 66-71) (1980).

[17] *See Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies*, 95 FCC 2d 1117 (1983), *aff'd, Illinois Bell Tel. Co. v. FCC,* 740 F.2d 465 (7th Cir. 1984).

[18] *Computer II Final Decision*, 77 FCC 2d at 475 (¶ 231).

This rule enabled competing providers of enhanced services "to use … a carrier's facilities under the same terms and conditions" that applied to the carrier itself.[19] The rule effectively required ILECs to offer on a common carrier basis any transmission capability that they chose to use in providing enhanced services. The Commission adopted the rule to ensure that competitors in the enhanced services market received "non-discriminatory access … to basic transmission services" – services that, at the time, were available only from the ILECs.[20]

When it announced the *Computer II* requirements, the FCC made clear that it "remain[ed] free to re-examine" its regulatory approach "as circumstances change generally."[21] Several years later, in the *Third Computer Inquiry* ("*Computer III*"), the Commission determined that the costs of the *Computer II* structural safeguards (reflected in "decreased efficiency and innovation") outweighed their benefits.[22] Consequently, the Commission replaced its structural separation requirements with an array of nonstructural safeguards that continued to require AT&T and the BOCs to provide their enhanced service competitors with

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[19] *Ibid.*

[20] *Ibid.*

[21] *Id.* at 487 (¶ 264).

[22] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 104 FCC 2d 958, 964 (¶ 3) (1986), *vacated, California v. FCC*, 905 F.2d 1217 (9th Cir. 1990), *on remand*, 6 FCC Rcd 7571 (1991), *vacated in part and remanded, California v. FCC*, 39 F.3d 919 (9th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995).

nondiscriminatory access to basic transmission services.[23] The Ninth Circuit twice vacated the Commission's removal of the structural separation requirements and remanded for further proceedings.[24]

(2) The Telecommunications Act of 1996

Ten years ago, Congress substantially amended the Communications Act by enacting the Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, 110 Stat. 56. The 1996 Act was intended to create "a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." S. Conf. Rep. No. 230, 104th Cong., 1st Sess. 1 (1996).

Congress anticipated that the deregulatory framework established by the 1996 Act would hasten the development of cutting-edge telecommunications technologies by removing regulatory impediments to innovation and investment. Consistent with that objective, section 706 of the statute directs the FCC and state regulatory commissions to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans ... by utilizing, in a manner consistent with the public interest," regulatory methods "that remove barriers to infrastructure investment." 1996 Act, § 706, 110 Stat. 153.

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[23] *Id.* at 1018-92 (¶¶ 111-265). The FCC later relieved AT&T of most of the *Computer III* requirements after concluding in 1995 that AT&T did not dominate any market. *See Competition in the Interstate Interexchange Marketplace*, 10 FCC Rcd 4562 (1995).

[24] *See California v. FCC*, 905 F.2d 1217; *California v. FCC*, 39 F.3d 919.

The 1996 Act employs the terms "telecommunications service" and "information service," which are defined in ways that closely resemble the basic and enhanced service categories that the FCC adopted in *Computer II*. *See* 47 U.S.C. §§ 153(20), (46). Telecommunications service – the statute's "analog to basic service – is 'the offering of telecommunications for a fee directly to the public … regardless of the facilities used.'" *Brand X,* 125 S. Ct. at 2697 (quoting 47 U.S.C. § 153(46)). The 1996 Act separately defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). Information service – the Act's "analog to enhanced service – is 'the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.'" *Brand X,* 125 S. Ct. at 2697 (quoting 47 U.S.C. § 153(20)).

(3) The *Cable Modem Order* and the *Brand X* Case

Since the enactment of the 1996 Act, the rapid growth of the Internet has sparked an increasing demand for "broadband" (high-speed) Internet access services.[25] At present, most subscribers use either of two common kinds of broadband Internet access: cable modem service (provided by cable television system operators over cable facilities) and digital subscriber line ("DSL") service (provided by local telephone companies over phone lines). *Brand X,* 125 S. Ct. at

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[25] *See generally* Industry Analysis & Technology Division, Wireline Competition Bureau, FCC, *High-Speed Services for Internet Access: Status as of June 30, 2005* (April 2006) (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-264744A1.pdf).

2696. As of December 2004, more than 60 percent of the consumers who purchased broadband Internet access subscribed to cable modem service. *Order* ¶ 51 (JA -). In the still-developing broadband market, the Commission has found that several other platforms are emerging, including satellite, wireless, and broadband over power lines. *Order* ¶ 50 (JA); *see also Brand X,* 125 S. Ct. at 2711.

Because broadband Internet access services combine transmission and data processing functions, questions have arisen about the regulatory status of those services under the Communications Act. The FCC first addressed those questions with respect to cable modem service, the undisputed leader in the broadband Internet access market (with a market share exceeding 60 percent). *See Order* ¶ 51 (JA -). In a declaratory ruling issued in March 2002, the Commission ruled that cable modem service, as currently provided, is neither a "cable service" governed by Title VI of the Communications Act nor a "telecommunications service" subject to Title II, but rather an "information service" as defined by the 1996 Act.[26]

In the *Cable Modem Order,* the Commission rejected arguments that it should classify cable modem service as both an information service and a telecommunications service. It concluded that cable modem service was viewed by end users as "a single, integrated service" that could not fairly be characterized

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[26] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, 4802 (¶ 7) (2002) ("*Cable Modem Order*"), *aff'd in part and rev'd in part, Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *rev'd, Brand X*, 125 S. Ct. 2688.

as two different service offerings.[27] The Commission reasoned that, from a consumer's perspective, the transmission component of cable modem service "is integral to" – and inseparable from – the service's data processing capabilities.[28]

The Commission also declined to find that *Computer II* required cable modem service providers to offer transmission service to competing information service providers ("ISPs") on a common carrier basis.[29] The Commission explained that its principal rationale for adopting the *Computer II* requirements "was that the telephone network is the primary, if not exclusive, means through which [ISPs] can gain access to their customers."[30] For that reason, the Commission had previously applied its *Computer II* obligations "exclusively to traditional wireline services and facilities."[31] In view of that regulatory history, the agency saw no reason to extend its *Computer II* requirements to cable operators offering information services.

The Ninth Circuit reversed the *Cable Modem Order* in part, ruling that the FCC should have classified the transmission component of cable modem service as a telecommunications service. 345 F.3d at 1127-32. On appeal, the Supreme

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[27] *Id.* at 4823 (¶ 38).

[28] *Ibid.* (¶ 39).

[29] *Id.* at 4824-26 (¶¶ 42-47).

[30] *Id.* at 4825 (¶ 44) (emphasis and internal quotations omitted).

[31] *Ibid.* (¶ 43).

Court reversed that ruling and upheld the *Cable Modem Order*. *Brand X*, 125 S. Ct. at 2699-2712.[32]

The Supreme Court held that the FCC's classification of cable modem service rested on a reasonable interpretation of the ambiguous term "offering" in 47 U.S.C. § 153(46), the statutory definition of "telecommunications service." *Brand X*, 125 S. Ct. at 2702-10. The Commission had construed the word "offering" in that provision "to mean a 'stand-alone' offering of telecommunications, *i.e.*, an offered service that, from the user's perspective, transmits messages unadulterated by computer processing." *Id.* at 2704. In the Court's assessment, that reading of the statute was reasonable, and the Commission reasonably determined that the functionally integrated transmission component of cable modem service did not constitute a distinct "offering" of telecommunications to an end user. *Id.* at 2704-06.

The Supreme Court in *Brand X* also rejected the notion that "the Communications Act unambiguously freezes in time the *Computer II* treatment of facilities-based information-service providers." *Brand X*, 125 S. Ct. at 2708. The Court found "nothing arbitrary about the Commission's providing a fresh analysis" of the need for the *Computer II* requirements. *Id.* at 2711. The FCC had originally adopted those requirements out of "concern that local telephone companies would abuse the monopoly power they possessed by virtue of the 'bottleneck' local telephone facilities they owned." *Id.* at 2708. The Court concluded that "changed

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[32] The Ninth Circuit had affirmed the *Cable Modem Order* in part, upholding the FCC's conclusion that cable modem service does not meet the Communications Act's definition of "cable service." 345 F.3d at 1132. The Supreme Court did not review that aspect of the Ninth Circuit's *Brand X* decision.

market conditions" mitigated that concern and justified a new approach vis-à-vis cable modem service: "Unlike at the time of *Computer II,* substitute forms of Internet transmission exist today ... 'over multiple electronic platforms, including wireline, cable, terrestrial wireless and satellite.'" *Id.* at 2711 (quoting *Cable Modem Order,* 17 FCC Rcd at 4802 (¶ 6)).

The Supreme Court further observed that the *Cable Modem Order* appeared to be "a first step in an effort to reshape the way the Commission regulates information-service providers." *Brand X,* 125 S. Ct. at 2711. In response to arguments that the FCC was treating cable modem service differently from DSL, the Court said that any such "inconsistency" could be "adequately addressed when the Commission fully reconsider[ed] its treatment of DSL service" in a separate proceeding. *Ibid.* That proceeding is the subject of this case.

B. The Order On Review

At the same time that the Commission was deciding how to classify cable modem service, it was reconsidering its regulatory program for wireline broadband Internet access services such as DSL. In 1998, the Commission had declared that any BOCs offering DSL had "a continuing obligation" under the *Computer Inquiries* "to offer competing ISPs nondiscriminatory access" on a common carrier basis to the transmission facilities used by the BOCs' DSL services.[33] As the Supreme Court recognized in *Brand X,* that conclusion rested on regulatory "history" and longstanding agency practice "rather than on an analysis of

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[33] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24031 (¶ 37) (1998) ("*Advanced Services Order*").

contemporaneous market conditions." 125 S. Ct. at 2711. Upon further reflection, the Commission concluded that changing circumstances called into question the desirability of continuing to apply the *Computer Inquiry* rules to wireline broadband Internet access services.

Accordingly, in February 2002, one month before it released the *Cable Modem Order*, the FCC issued a notice of proposed rulemaking concerning wireline broadband Internet access.[34] The notice primarily sought comment on two issues: (1) how to classify wireline broadband Internet access services under the Communications Act;[35] and (2) whether those services should remain subject to the *Computer Inquiry* requirements.[36]

After receiving and reviewing comments from numerous parties, the FCC addressed these subjects in an order released shortly after the Supreme Court issued the *Brand X* decision. On the basis of the record and the *Brand X* decision, the Commission first determined that wireline broadband Internet access service (like cable modem service) is an information service that does not include a separate telecommunications service. *Order* ¶¶ 12-17, 104-105 (JA - , -). Then, after weighing the costs and benefits of continued regulation, the Commission decided to eliminate the *Computer Inquiry* requirements for wireline broadband Internet access services. *Order* ¶¶ 32-85 (JA -).

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[34] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019 (2002) (JA) ("*NPRM*").

[35] *NPRM* ¶¶ 17-29 (JA -).

[36] *NPRM* ¶¶ 30-53 (JA -).

(1) Classification Of Wireline Broadband Internet Access Service

The Commission found that, from a consumer's perspective, wireline broadband Internet access service resembles cable modem service because it "inextricably combines the offering of powerful computer capabilities with telecommunications." *Order* ¶ 15 (JA). Like a subscriber to cable modem service, an "end user of wireline broadband Internet access service receives an integrated package of transmission and information processing capabilities." *Order* ¶ 16 (JA). In view of these functional similarities, the Commission concluded that wireline broadband Internet access service, like cable modem service, is an "information service" as defined by the Communications Act.

Likewise, employing the same reasoning that the Supreme Court affirmed in *Brand X,* the Commission found that the transmission component of wireline broadband Internet access service is not a "telecommunications service" under the Communications Act because it is not a separate "offering" of telecommunications. *Order* ¶¶ 104-105 (JA -). The Commission explained that subscribers to wireline broadband Internet access service "do not expect to receive (or pay for) two distinct services." *Order* ¶ 104 (JA). Instead, just as with cable modem service, the Commission found that "the transmission capability" of wireline broadband Internet access service is viewed by end users as "part and parcel of, and integral to, the [service's] Internet access ... capabilities." *Ibid.* (JA). It based this determination on record evidence that "end users of wireline broadband Internet access service receive and pay for a single, functionally integrated service,

... rather than both an information service and a telecommunications service." *Order* ¶ 105 (JA).

By applying the same classification to both cable and wireline high-speed Internet access services, the Commission sought to develop "an analytical framework that is consistent, to the extent possible, across multiple platforms that support competing services." *Order* ¶ 17 (JA).

(2) Elimination Of The *Computer Inquiry* Requirements For Wireline Broadband Internet Access

The Commission decided to eliminate the *Computer Inquiry* requirements for wireline broadband Internet access services on the basis of three factors: the dynamic market for broadband Internet access; the substantial costs of the *Computer Inquiry* regulations; and the absence of a compelling need for those regulations. *Order* ¶¶ 77-85 (JA -).

The Dynamic Marketplace. The Commission first observed that the "emerging and rapidly changing" market for broadband Internet access was already "markedly different" from the data processing market that had provided the backdrop for the *Computer Inquiries*. *Order* ¶ 47 (JA). When the FCC first imposed the *Computer Inquiry* obligations on ILECs, "only a single platform" – the telephone network – was "capable of delivering" information services, and "only a single facilities-based provider of that platform" – the local phone company – "was available to deliver" information services to end users. *Ibid.* By contrast, "broadband Internet access services have never been restricted to a single network platform provided by the [ILECs]." *Ibid.* Indeed, the ILECs do not even

have the largest number of broadband subscribers; as the Commission noted, cable modem service is currently "the most widely used means" of high-speed Internet access by residential users and small businesses, serving more than 60 percent of those users. *Order* ¶ 51 (JA -).

The Commission recognized that cable modem and DSL providers were the current market leaders, and that some consumers did not have access to both of these platforms. *Order* ¶ 50 (JA). But the agency anticipated that this situation would change as the market for broadband Internet access evolved. Noting the "dynamic nature" of that market, the Commission found that "a wide variety of competitive and potentially competitive" offerings of broadband Internet access were emerging, including satellite, wireless, and broadband over power lines. *Order* ¶ 50 (JA).

Given the unique characteristics of the broadband Internet access market, the Commission declined to conduct a conventional "market dominance" analysis in this proceeding. *Order* ¶¶ 84-85 (JA -). It had historically applied such analysis to a telecommunications industry that featured a bottleneck monopoly. But the Commission found that such a monopoly had never existed in the market for high-speed Internet access. In particular, the Commission found that "the current market leaders, cable operators and wireline carriers, face competition not only from each other but also from other emerging broadband Internet access service providers." *Order* ¶ 84 (JA).

The Commission reasoned that any finding of market dominance or non-dominance in this context "would be premature" because the broadband Internet

access market was still in its infancy. *Order* ¶ 85 (JA). The agency noted that "market penetration" by cable modem service and DSL "still is far below the size of the potential market." *Order* ¶ 55 (JA). Recognizing the prospect that newly emerging broadband platforms could grow in popularity, the Commission found that it could not discern from "the current developing market which technology or technologies will serve the majority of customers." *Order* ¶ 59 (JA). Consequently, the Commission decided that the "emerging market" for broadband Internet access was best "analyzed in view of larger trends in the marketplace, rather than exclusively through ... snapshot data that may quickly and predictably be rendered obsolete as this market continues to evolve." *Order* ¶ 50 (JA).

After evaluating recent market trends, the Commission concluded: "Continuous change and development are likely to be the hallmark of the marketplace for broadband Internet access at both the retail and wholesale levels over the next several years." *Order* ¶ 56 (JA). The Commission predicted that "the threat of competition" from various forms of broadband Internet access would "stimulate deployment of broadband infrastructure" by cable operators and ILECs. *Order* ¶ 57 (JA). The agency also expected that growing demand for broadband Internet access would trigger more competition by "alternative technologies" and multiple broadband platforms. *Order* ¶ 61 (JA).

The Cost Of Regulation. The Commission next determined that the costs of compliance with the *Computer Inquiry* obligations – including the need to adopt "redundant systems and duplicative processes" – serve as an "investment

disincentive" for providers of wireline broadband Internet access. *Order* ¶ 68 (JA).

In particular, the Commission determined that equipment "vendors do not create new technologies with the *Computer Inquiry* requirements in mind." *Order* ¶ 65 (JA). Therefore, as long as those rules remained in effect, ILECs could not use "more efficient, integrated equipment" unless they incurred "substantial additional costs" and delays "to have the vendor 'de-integrate' the … equipment simply to comply with the *Computer Inquiry* requirements." *Order* ¶ 66 (JA). The Commission concluded that these "increased costs and delays often deter a carrier from deploying new broadband technologies." *Ibid.*

Similarly, the record showed that the *Computer Inquiry* requirements hampered ILECs' ability to develop new broadband Internet access services in response to consumer demand. *Order* ¶ 71 (JA -). For instance, Verizon stated in comments that "it frequently must deny requests for new Internet access service capabilities because the process to accommodate them under existing *Computer Inquiry* regulations is prohibitively expensive." *Ibid.* (JA).

On the basis of the record, the Commission found that the "costs, inefficiencies, and delays" entailed in complying with the *Computer Inquiry* requirements "are significant and substantially impede network development" for wireline broadband Internet access services. *Order* ¶ 71 (JA). "Continued application of the *Computer Inquiry* rules," the Commission concluded, "would prevent much … innovation from occurring." *Order* ¶ 70 (JA). The agency determined that this "by-product" of the rules was "a persuasive factor for their

removal." *Ibid.* Citing its mandate under section 706 of the 1996 Act to encourage broadband deployment, *Order* ¶ 78 (JA), the Commission reasoned that eliminating the *Computer Inquiry* regulations would allow ILECs to "take more risks in investing in and deploying new technologies than they are willing and able to take under the existing regime." *Order* ¶ 72 (JA).

No Compelling Need For Regulation. Finally, the Commission found that the *Computer Inquiry* requirements were no longer necessary to ensure that competing ISPs would receive "nondiscriminatory access" to ILECs' transmission services. *See Computer II Final Decision,* 77 FCC 2d at 475 (¶ 231). Instead, the Commission concluded that the ILECs would have "significant ... business incentives ... to offer broadband transmission on a commercially reasonable basis to independent ISPs." *Order* ¶ 75 (JA).

The Commission found evidence in the record that ILECs have "an economic incentive to spread the costs" of their networks "over as much traffic and as many customers as possible regardless of whether such customers are wholesale or retail." *Order* ¶ 74 (JA). The Commission expected that the ILECs' incentive to offer wholesale transmission to independent ISPs would grow even stronger once competitive Internet telephony services began to erode the ILECs' revenues from traditional voice services. *Order* ¶ 76 (JA). The record also indicated that even if the *Computer Inquiry* requirements were removed, ILECs would likely continue to offer transmission services that "enable consumers to reach unaffiliated ISPs because consumers demand the choice, and meeting that demand makes [the ILECs'] product more attractive." *Order* ¶ 74 (JA).

In addition, the Commission determined that the *Computer Inquiry* requirements were no longer necessary "to protect against improper cross-subsidization" – the potential for ILECs to shift costs from unregulated information services to regulated telecommunications services. *Order* ¶ 82 (JA). At the time of the *Computer Inquiries,* such cost-shifting was a genuine concern because ILECs set their regulated rates for telephone service on the basis of the cost of providing service. Since 1990, however, the FCC has used price cap regulation, under which the costs of providing service are largely irrelevant to the rates ILECs may charge. Most states have taken the same approach. The Commission concluded that these changes in rate-setting methodology reduced the risk that ILECs will "increase rates for tariffed telecommunications services through cost shifting." *Order* ¶ 83 (JA).

(3) The New Regulatory Framework

Under the terms of the *Order*, ILECs have the option of offering broadband transmission service on a non-common carrier basis (through privately negotiated contracts) or a common carrier basis (with generally available rates, terms, and conditions). *Order* ¶¶ 86-95 (JA -). There is one exception: For one year after the *Order*'s effective date, ILECs must honor existing transmission arrangements with their current ISP customers. The Commission adopted this one-year transition period to prevent sudden service disruptions and to give both ISPs and ILECs time to adjust to the new regulatory framework. *Order* ¶¶ 98-99 (JA -).

Anticipating that some ILECs would wish to withdraw their common carrier offerings of broadband Internet access transmission service after the transition period, the Commission granted a blanket certification to discontinue such service pursuant to section 214(a) of the Communications Act, 47 U.S.C. § 214(a). *Order* ¶¶ 100-101 (JA -). To discontinue service pursuant to this certification, a carrier must "provide affected customers with advance notice" of the discontinuance; and "on or after the date" of this advance notice "and at least 30 days prior to the date on which service will be discontinued, the carrier must file with the Commission notice of its intent to discontinue service." *Order* ¶ 101 (JA). "Upon notification of discontinuance, the Commission reserves the right to take actions where appropriate under the circumstances to protect the public interest." *Ibid.*

Finally, the Commission declared that certain regulatory obligations (including selected provisions of Title II) would continue to apply to providers of wireline broadband Internet access. *Order* ¶¶ 108-144 (JA -). The agency also sought comment on whether it should exercise its Title I authority to impose additional requirements on all providers of broadband Internet access. *Order* ¶¶ 146-157 (JA -). In a separate order issued on the same day as the *Order* on review, the Commission concluded that facilities-based providers of broadband Internet access are subject to the requirements of the Communications Assistance for Law Enforcement Act ("CALEA"), 47 U.S.C. § 1001 *et seq.*[37]

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[37] *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, 20 FCC Rcd 14989 (2005) ("*CALEA Order*"), *petitions for review pending, American Council on Education v. FCC*, D.C. Cir. No. 05-1404 (and consolidated cases) (oral argument held May 5, 2006).

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress has entrusted the Federal Communications Commission with the challenging task of overseeing the development of a vibrant and volatile communications industry. Over the years, that industry has undergone – and continues to undergo – dramatic technological changes. The FCC must take those changes into account when performing its regulatory duties. "The Commission has an ongoing obligation to monitor its regulatory programs and make adjustments in light of actual experience." *Telocator Network of America v. FCC,* 691 F.2d 525, 550 n.191 (D.C. Cir. 1982). Among other things, the agency must act to ensure that its regulations do not thwart the national policy "to encourage the provision of new technologies and services to the public." 47 U.S.C. § 157(a). More specifically, as part of its mandate under the 1996 Act, the FCC must "encourage" the timely deployment of "advanced telecommunications capability to all Americans" by using regulatory "methods that remove barriers to infrastructure investment." 1996 Act, § 706, 110 Stat. 153.

The explosive growth of the Internet and related technologies compelled the Commission to take a new look at its existing regulations. After the Commission decided not to impose common carrier requirements on providers of cable modem service, and after the Supreme Court affirmed that decision, the Commission rightly reconsidered whether it made sense any longer to continue applying common carrier regulation to phone companies providing broadband Internet access. The *Order* at issue here flowed logically from the decision that the Supreme Court upheld in *Brand X,* 125 S. Ct. 2688. Once the Commission elected not to adopt common carrier requirements for providers of cable modem service –

which at that time served more than 60 percent of consumers using broadband Internet access – it was entirely reasonable for the agency to accord the same treatment to providers of wireline broadband Internet access, which have won a much smaller share of the market.[38]

I. After the Supreme Court in *Brand X* affirmed the FCC's classification of cable modem service, it was plainly reasonable for the Commission to apply the same classification to wireline broadband Internet access service. From a consumer's perspective, the two services are functionally identical. Each of these Internet access services provides end users with a functionally integrated information service. Neither of these services involves a discrete offering of telecommunications. Given the functional similarity between these services, the Commission here properly adopted the same reasoning that the Supreme Court upheld in *Brand X*. Consistent with its previous analysis of cable modem service, the Commission reasonably found that the transmission component of wireline broadband Internet access service does not fall within the Communications Act's definition of "telecommunications service."

II. On the basis of substantial record evidence, the Commission determined that the costs of applying the *Computer Inquiry* requirements to wireline broadband Internet access exceeded the benefits. The record showed that the costs of compliance with those regulations were stifling innovation and investment in new broadband services and technologies. In stark contrast to these substantial

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[38] The FCC's analysis of competition issues in this case is distinct from the market definition standards and analyses of entry and competitive effects that the Department of Justice applies in enforcing the antitrust laws, which may lead to different results.

costs, the Commission found no compelling reason to retain the regulations. While the *Computer Inquiry* rules once served a valuable purpose in the data processing market of the 1980s – ensuring nondiscriminatory access to transmission in a market where the ILECs held a bottleneck monopoly – the need for those rules has largely evaporated in the emerging 21st century market for broadband Internet access. That dynamic market has never been served by a single bottleneck monopoly controlled by the ILECs. Throughout most of the country, consumers already have a choice of at least two broadband transmission platforms (cable modem and DSL). And the Commission found record evidence that several other platforms (including satellite, wireless, and power lines) are emerging to provide additional competition in this still-developing market.

The Commission expected that technological changes would spur increasing competition among multiple broadband Internet access platforms. Given this trend toward greater competition, the Commission reasonably predicted that ILECs would have economic incentives to provide wholesale broadband Internet access transmission on commercially reasonable terms even if they were no longer required to do so by FCC rules. Consequently, the Commission saw no need to continue requiring ILECs to offer this wholesale service on a common carrier basis.

On the other hand, the Commission had good reason to eliminate the *Computer Inquiry* regulations for wireline broadband Internet access. It reasonably concluded that lifting those regulatory burdens – the vestiges of a bygone era –

would enhance ILECs' incentives to invest in innovative new services and broadband infrastructure.

Ultimately, after carefully assessing the costs and benefits of the *Computer Inquiry* rules, the FCC reasonably decided to eliminate those rules for wireline broadband Internet access. The Commission reasoned that this new regulatory approach, by removing needless regulatory impediments to investment and innovation, will best achieve the objective of section 706 of the 1996 Act: the timely deployment of broadband services and technologies to consumers throughout the nation. While petitioners may disagree with that policy choice, they have failed to show that any aspect of the FCC's *Order* is arbitrary or capricious.

STANDARD OF REVIEW

Insofar as petitioners challenge the FCC's interpretation of the Communications Act, the Court's review is governed by *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under *Chevron*, if "Congress has directly spoken to the precise question at issue," the Court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. But "if the statute is silent or ambiguous with respect to the specific issue, the question for the [C]ourt is whether the [agency's decision] is based on a permissible construction of the statute." *Id.* at 843. If the implementing agency's reading of an ambiguous statute is reasonable, *Chevron* requires this Court "to accept the agency's construction of the statute, even if the agency's reading differs from what the [C]ourt believes is the best statutory interpretation." *Brand X*, 125 S. Ct. at 2699.

Petitioners also challenge the reasonableness of the FCC's decision to lift the *Computer Inquiry* requirements for wireline broadband Internet access. The Court must affirm that decision unless the agency's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This "deferential standard" of review "presume[s] the validity of agency action." *SBC Inc. v. FCC,* 414 F.3d 486, 496 (3d Cir. 2005) (internal quotations omitted). Judicial deference to the FCC's "expert policy judgment" is especially appropriate in cases like this one, where the "'subject matter ... is technical, complex, and dynamic.'" *Brand X,* 125 S. Ct. at 2712 (quoting *National Cable & Telecommunications Ass'n v. Gulf Power Co.,* 534 U.S. 327, 339 (2002)).

To satisfy the Administrative Procedure Act, the agency "need only set forth the basis of its administrative action 'with such clarity as to be understandable'; it need not provide a detailed statement of its reasoning and conclusions." *Kamara v. Attorney General,* 420 F.3d 202, 212 (3d Cir. 2005) (quoting *SEC v. Chenery Corp.,* 332 U.S. 194, 196 (1947)). The courts have upheld administrative decisions "of less than ideal clarity if the agency's path may reasonably be discerned." *South Trenton Residents Against 29 v. Federal Highway Administration,* 176 F.3d 658, 666 (3d Cir. 1999) (quoting *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 286 (1974)).

ARGUMENT

I. THE COMMISSION REASONABLY CONCLUDED THAT THE TRANSMISSION COMPONENT OF WIRELINE BROADBAND INTERNET ACCESS SERVICE IS NOT A "TELECOMMUNICATIONS SERVICE" UNDER THE COMMUNICATIONS ACT

The Communications Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public." 47 U.S.C. § 153(46). The FCC has construed the ambiguous word "offering" in that definition "to mean a 'stand-alone' offering of telecommunications, *i.e.*, an offered service that, from the user's perspective, transmits messages unadulterated by computer processing." *Brand X*, 125 S. Ct. at 2704. Thus, in assessing whether cable modem service met the definition of "telecommunications service," the Commission focused on "what the consumer perceives to be the integrated finished product." *Ibid.* The agency reasoned that "from the consumer's point of view, ... cable modem service is not a telecommunications offering because the consumer uses" the service's high-speed transmission "always in connection with the information-processing capabilities provided by Internet access." *Id.* at 2703. Given the "functionally integrated" nature of cable modem service – its combination of transmission and data processing – the Commission reasonably concluded that providers of the service do not make a "distinct offering" of telecommunications to end users. *Id.* at 2705. In *Brand X*, the Supreme Court upheld the agency's reasonable determination that the transmission component of cable modem service does not fit the statutory definition of "telecommunications service." *Id.* at 2702-10.

In this case, the FCC addressed a very similar question: Does the transmission component of wireline broadband Internet access service meet the definition of "telecommunications service"? To answer that question, the Commission employed the same analytical approach that the Supreme Court upheld in *Brand X*. Basing its analysis on "customers' understanding" of wireline broadband Internet access, the Commission found that the service's "transmission capability is part and parcel of, and integral to," its Internet access capabilities. *Order* ¶ 104 (JA -). Wireline broadband Internet access service, "like cable modem service, provides end users more than pure transmission." *Order* ¶ 15 (JA). A "user of wireline broadband Internet access service" – like a user of cable modem service – "receives an integrated package of transmission and information processing capabilities." *Order* ¶ 16 (JA). Noting the functional resemblance between the two services, the Commission reasonably determined that wireline broadband Internet access service, like cable modem service, is "a functionally integrated, finished product, rather than both an information service and a telecommunications service." *Order* ¶ 105 (JA).

A. The Record Supported The Commission's Conclusion

Contrary to CompTel's assertion (Br. 24-26), substantial record evidence supported the FCC's decision to classify wireline broadband Internet access service just like cable modem service. The record here merely confirmed what consumers already know: The offering of wireline broadband Internet access to end users "is, in all functional respects, indistinguishable from cable modem

service."[39] The record thus amply substantiated the FCC's finding that wireline broadband Internet access service, like cable modem service, is a functionally integrated information service.

CompTel argues (Br. 26-28) that the Commission's finding of a single integrated service in this case conflicts with past FCC orders requiring that ILECs separately offer the transmission underlying their information services to their competitors. In addition, CompTel claims (Br. 28) that the Commission's expectation that ILECs will continue voluntarily to "offer stand-alone DSL transmission" to their competitors "confirms that DSL-based Internet access service consists of two separate services." These arguments confuse the *wholesale* market for stand-alone transmission with the *retail* market for broadband Internet access. The pertinent issue here – whether wireline broadband Internet access service includes a telecommunications offering – hinges on "the nature of the functions the *end user* is offered." *Brand X,* 125 S. Ct. at 2703 (internal quotations

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[39] Qwest Comments at 7 (JA); *see also* SBC Comments at 16 (JA) ("just like cable modem service, wireline broadband providers offer 'a single, integrated service that enables the subscriber to utilize Internet access service through' the provider's facilities") (quoting *Cable Modem Order*, 17 FCC Rcd at 4823 (¶ 38)); *id.* at 17 (JA) ("For the same reasons as in the cable modem context, wireline broadband Internet access service ... does not contain a separate 'telecommunications service.' The transmission capabilities offered to customers are 'part and parcel' of the product offered to end users and 'integral' to the capabilities of Internet access.") (quoting *Cable Modem Order*, 17 FCC Rcd at 4823 (¶ 39)); BellSouth Comments at 11 (JA) ("There is no discernable distinction between broadband Internet access service provided by an ILEC and cable modem service other than the facilities used."); Qwest Comments at 6 (JA) ("providers of cable modem services and providers of DSL ... both offer end users a bundle of virtually identical services that are distinct primarily in their underlying transport platform").

omitted). The fact that ILECs have previously offered – and may continue to offer – broadband transmission separately "*to competitors* ... has no bearing on the nature" of the functionally integrated broadband Internet access service that ILECs "offer their *end user customers.*" *Order* ¶ 105 (JA).

CompTel makes much of the 1998 *Advanced Services Order,* in which the FCC stated that it would treat the transmission and data processing components of DSL as two separate services (a telecommunications service and an information service). Br. 27 (quoting *Advanced Services Order,* 13 FCC Rcd at 24030 (¶ 36)). But the Commission has frankly admitted that its past statements on the regulatory status of Internet access have "not been entirely consistent." *Order* at n.32 (JA). Indeed, in a report submitted to Congress several months before the *Advanced Services Order,* the FCC said that "it would be incorrect to conclude that Internet access providers offer subscribers separate [telecommunications] services." *Federal-State Joint Board on Universal Service,* 13 FCC Rcd 11501, 11539 (¶ 79) (1998) ("*Universal Service Report*"). Reasoning that "the categories of 'telecommunications service' and 'information service' in the 1996 Act are mutually exclusive," *id.* at 11520 (¶ 39), the Commission declared in the *Universal Service Report* that Internet access service "is appropriately classed as an 'information service'" because "it offers end users information-service capabilities inextricably intertwined with data transport." *Id.* at 11539-40 (¶ 80).

Four years later, "the Commission relied heavily on its *Universal Service Report*" when classifying cable modem service as a single, functionally integrated information service. *Brand X,* 125 S. Ct. at 2697. The Supreme Court upheld the

statutory interpretation that the FCC articulated in the *Universal Service Report* and later applied in the *Cable Modem Order*. *Id.* at 2702-10. The Commission appropriately adopted the same reading of the statute in this case.[40]

B. The Commission Reasonably Construed The Statutory Definition Of "Telecommunications Service"

The *Order*'s classification of wireline broadband Internet access flowed logically from the Supreme Court's *Brand X* decision. After *Brand X* affirmed the reasonableness of the FCC's classification of cable modem service, it made perfect sense for the Commission to apply the same treatment to a functionally equivalent service provided over telephone lines. By classifying like services alike, in a manner "consistent with *Brand X*," the Commission properly adopted "an analytical framework that is consistent ... across multiple platforms that support competing services." *Order* ¶ 17 (JA). There is thus no basis for CompTel's contention (Br. 31-32) that the FCC improperly relied on *Brand X*.

Although CompTel tries to distinguish this case from *Brand X*, the Supreme Court's decision in that case leaves no doubt that the FCC's statutory interpretation in this case is permissible. The Commission here adopted the same interpretation of the statutory term "telecommunications service" that the Supreme Court upheld

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[40] *See Order* at n.32 (JA) ("we agree ... with the past Commission pronouncements that the categories of 'information service' and 'telecommunications service' are mutually exclusive"). CompTel claims (Br. 39) that "this concept of mutual exclusivity is inconsistent with the Commission's own *Computer II* decision." To the contrary, the Supreme Court in *Brand X* concluded that the Commission's distinction between the statutory service categories mirrored its approach in *Computer II*. In both instances, the Commission defined services "functionally, based on how the consumer interacts with the provided information." *Brand X*, 125 S. Ct. at 2706.

in *Brand X*. Nonetheless, CompTel challenges the reasonableness of the FCC's statutory construction on several grounds. In the wake of *Brand X*, those challenges must fail.

CompTel maintains (Br. 57) that "Congress did not intend for carriers to be able to choose to be regulated or unregulated" by virtue of the type of service they offer to end users. This argument ignores the language of the statute. The Act defines both "telecommunications service" (which is subject to Title II) and "information service" (which is generally unregulated) in terms of what the carrier is "offering." *See* 47 U.S.C. §§ 153(20), (46). Therefore, the application of those definitions to a particular service necessarily depends on what is being offered to end users. *See Brand X*, 125 S. Ct. at 2703-06.

CompTel also contends (Br. 52-55) that the Commission's classification of wireline broadband Internet access service is unreasonable because it leaves that service beyond the reach of federal regulation. That is incorrect. As the Supreme Court recognized in *Brand X*, "the Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction" even if it does not classify any part of Internet access service as a telecommunications service. *Brand X*, 125 S. Ct. at 2708.

Similarly, CompTel argues (Br. 55) that the FCC's statutory interpretation unreasonably allows ILECs to avoid Title II regulation "simply by bundling an unregulated information service with an otherwise regulated telecommunications service." The Supreme Court rejected that argument in *Brand X*. It noted that the FCC's reading of the statute insulates a carrier's provision of transmission from

Title II regulation *only* if the transmission is a functionally integrated part of an information service. *Brand X,* 125 S. Ct. at 2708-09. Consequently, ILECs cannot evade Title II regulation of their traditional telephone service merely by packaging that service with an information service that is only "trivially" related to the telephone service (*e.g.,* by combining telephone service with voice mail). *Id.* at 2709.

Contrary to CompTel's contention (Br. 32-43), the FCC's construction of a different statute (the Communications Assistance for Law Enforcement Act or "CALEA") in a separate order (the *CALEA Order*) does not diminish the reasonableness of the agency's reading of the Communications Act in this case. The Supreme Court ruled in *Brand X* that the FCC could reasonably construe the Communications Act's definition of "telecommunications service" to exclude the transmission component of a functionally integrated Internet access service. *Brand X,* 125 S. Ct. at 2702-10. The Commission adopted the same statutory construction in this case. Regardless of how the agency may have interpreted CALEA in another proceeding, there is no question after *Brand X* that the FCC's reading of the Communications Act in this case was reasonable.

Furthermore, CompTel's extended discussion of CALEA is a red herring. The text, structure, and purpose of CALEA differ in critical respects from those of the Communications Act. Accordingly, the Commission's regulatory treatment of broadband Internet access providers under CALEA sheds no light on the primary issue raised by CompTel – whether the transmission component of wireline

broadband Internet access service should be classified as a "telecommunications service" under the Communications Act.

The Commission's *CALEA Order* includes a careful and detailed review of the relationship between CALEA and the Communications Act – a review that CompTel ignores. *See CALEA Order,* 20 FCC Rcd at 14996-99 (¶¶ 15-18). In performing that review, the Commission identified numerous textual and structural differences between the two statutes that bear directly on how the transmission component of broadband Internet access services should be treated.

As the Commission explained, the proper classification of broadband Internet access service under the Communications Act depends not simply on the Act's definition of "information service," but on the complementary definitions of "telecommunications service" and "telecommunications" and on the Act's focus on the nature of the "offering" from the perspective of the service's end users – all of which militate against treating the transmission component of an integrated offering of broadband Internet access as a distinct "telecommunications service." *CALEA Order,* 20 FCC Rcd at 14996-97 (¶ 15). The Commission then pointed out that CALEA differs from the Communications Act in all of these respects. Unlike the Communications Act, "CALEA does not define or utilize the term 'telecommunications service'" or "adopt the Communications Act's narrow definition of 'telecommunications'" or "construct a definitional framework in which the regulatory treatment of an integrated service depends on its classification into one of two mutually exclusive categories, *i.e.,* telecommunications service or information service." *Id.* at 14998 (¶ 16).

In addition, CALEA and the Communications Act define the term "telecommunications carrier" differently. Unlike the Communications Act, CALEA defines "telecommunications carrier" to include carriers "engaged in providing wire or electronic communication switching or transmission service ... that the Commission finds ... is a replacement for a substantial portion of the local telephone exchange service." 47 U.S.C. § 1001(8)(B)(ii). The Commission relied heavily on this "substantial replacement" provision when it determined that CALEA's requirements apply to facilities-based providers of broadband Internet access. *CALEA Order,* 20 FCC Rcd at 15002-07 (¶¶ 26-36).

As the Commission also pointed out, the Communications Act and CALEA have fundamentally different purposes, and those differing purposes properly inform the Commission's construction and application of the two statutes. CALEA was enacted "to preserve the ability of law enforcement agencies to conduct electronic surveillance" notwithstanding the development of new telecommunications technologies. *CALEA Order,* 20 FCC Rcd at 14990 (¶ 4). The Communications Act, on the other hand, was adopted to create a general framework for regulating communications services. The Commission sensibly took these differences into account when interpreting the two statutes.

Although both statutes include similar definitions of "information service," neither definition makes clear whether the telecommunications used to provide the service "falls within the information service category." *CALEA Order,* 20 FCC Rcd at 14998 (¶ 17). The Commission reasonably decided to resolve this "definitional ambiguity ... in light of CALEA's purposes and the public interest,

without being bound by" its construction of a similar definition in the Communications Act. *Ibid.*

It was entirely reasonable for the agency to construe the same term differently in the context of different statutes with different structures and purposes.[41] That is particularly so where, as here, the agency is acting under the second prong of *Chevron*. *See Brand X,* 125 S. Ct. at 2704-08. Under *Chevron,* "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion," and the exercise of that delegated authority involves "difficult policy choices." *Id.* at 2699. Thus, both here and in the *CALEA Order,* the Commission's task was not to engage in mechanical interpretation of unambiguous statutory language, but instead to make policy choices to inform the construction of ambiguous language. In these circumstances, the Commission is entitled (and, indeed, obligated) to exercise its interpretive authority to further the policy goals of the particular statutory scheme before it, even if similar provisions permit a different construction or application under another statute with different goals.[42]

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[41] *See Atlantic Cleaners & Dyers, Inc. v. United States,* 286 U.S. 427, 435 (1932) ("no rule of statutory construction ... prevents" different interpretations of the same term in different statutes); *General Dynamics Land Systems, Inc. v. Cline,* 540 U.S. 581, 595 n.8 (2004) (rejecting the assumption that "a word which appears in two or more legal rules, ... in connection with more than one purpose, has and should have precisely the same scope in all of them") (internal quotations omitted).

[42] CompTel erroneously claims (Br. 37) that the Commission is precluded from responding to CompTel's CALEA argument by *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). *Chenery* stands for the proposition that reviewing courts cannot affirm agency action on the basis of a rationale that the agency itself did not articulate. *See id.* at 87-88, 93-95. That principle is inapplicable here because the FCC in the

(footnote continued on next page)

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In the end, CompTel's various arguments – many of which were rejected by the Supreme Court in *Brand X* – cannot obscure the reasonableness of the FCC's decision to classify wireline broadband Internet access service just like cable modem service. After the Supreme Court in *Brand X* upheld the FCC's classification of cable modem service, the Commission in this case applied the same classification to a functionally identical service provided over telephone lines. Employing the same statutory interpretation that the Supreme Court upheld in *Brand X,* the Commission reasonably found that the transmission component of wireline broadband Internet access service is not a "telecommunications service" under the Communications Act. This Court should affirm.

II. THE COMMISSION REASONABLY DECIDED TO ELIMINATE THE *COMPUTER INQUIRY* REQUIREMENTS FOR WIRELINE BROADBAND INTERNET ACCESS SERVICES

In subjecting facilities-based providers of information services to common carrier duties during the *Computer Inquiries* more than 25 years ago, the FCC acted out of "concern that local telephone companies would abuse the monopoly power they possessed by virtue of the 'bottleneck' local telephone facilities they owned." *Brand X,* 125 S. Ct. at 2708. At that time, "only a single platform" (the

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(footnote continued from previous page)
CALEA Order fully addressed arguments concerning the alleged inconsistency between its classification of wireline broadband Internet access service under the Communications Act and its interpretation of CALEA. CompTel and others have petitioned for review of the *CALEA Order* in the D.C. Circuit. *See American Council on Education v. FCC*, D.C. Cir. No. 05-1404 (and consolidated cases) (oral argument held May 5, 2006). Petitioners in that case are raising essentially the same inconsistency argument that CompTel is raising here.

telephone network) – owned and operated by "a single facilities-based provider" (the local phone company) – "was available to deliver" information services "to any particular end user." *Order* ¶ 47 (JA).

Much has changed in the last quarter-century. Unlike the market conditions that prevailed when the FCC adopted its *Computer Inquiry* regulations, high-speed Internet access services have never been confined to a single "bottleneck" platform controlled by the ILECs. *Order* ¶ 47 (JA). As the Supreme Court noted in *Brand X,* "Unlike at the time of *Computer II,* substitute forms of Internet transmission exist today … 'over multiple electronic platforms, including wireline, cable, terrestrial wireless and satellite.'" *Brand X,* 125 S. Ct. at 2711 (quoting *Cable Modem Order,* 17 FCC Rcd at 4802 (¶ 6)). Indeed, most consumers using broadband Internet access currently receive their service through cable facilities, not telephone lines. *Order* ¶ 51 (JA -).

In light of these fundamentally "changed market conditions," the FCC decided to conduct "a fresh analysis of the problem" that it had originally addressed in the *Computer Inquiries. Brand X,* 125 S. Ct. at 2711. It began by adopting the proposition that "broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market." *Ibid.* (quoting *Cable Modem Order,* 17 FCC Rcd at 4802 (¶ 5)). Consistent with that premise, the Commission declined to subject providers of cable modem service to the *Computer Inquiry* regulations, which historically had "applied exclusively to traditional wireline services and facilities." *Cable Modem Order,* 17 FCC Rcd at 4825 (¶ 43). The Supreme Court in *Brand X* upheld that

decision as a reasonable policy judgment, in large part because it accepted the FCC's view that the market had changed dramatically since the time of the *Computer Inquiries*. *Brand X*, 125 S. Ct. at 2710-11.

In this proceeding, the FCC took the next logical step in reshaping its regulatory approach toward facilities-based ISPs: It eliminated the *Computer Inquiry* requirements for providers of wireline broadband Internet access services. Its decision to end those requirements – like its earlier decisions to adopt and modify them – rested on "an assessment of the relative costs and benefits" of regulation. *Order* ¶ 78 (JA). After carefully evaluating the record here, the Commission reasonably concluded that the costs of continued regulation outweighed the benefits. *Order* ¶¶ 32-85 (JA -).

There is no merit to CompTel's contention (Br. 44-47) that the *Order*'s elimination of the *Computer Inquiry* requirements deviated from past FCC precedent. That argument rests on the misconception that the agency previously read the 1996 Act to preclude any modification of the *Computer Inquiry* rules. The Commission did no such thing. It merely observed – and the Supreme Court agreed – that the statutory definitions of information service and telecommunications service "parallel" the *Computer II* definitions of enhanced and basic service. *Brand X*, 125 S. Ct. at 2708; *Universal Service Report*, 13 FCC Rcd at 11511 (¶ 21). The Commission has never taken the position – and the Supreme Court thought it "improbable" – that "the Communications Act unambiguously freezes in time the *Computer II* treatment of facilities-based information-service providers." *Brand X*, 125 S. Ct. at 2708. To the contrary, Congress specifically

contemplated that the Commission could adopt new regulations superseding the "information access" requirements that were in place when the 1996 Act became law. *See* 47 U.S.C. § 251(g).

As the Supreme Court recognized, when the FCC adopted the *Computer Inquiry* requirements, it made a "policy choice" to "regulate more stringently, in its discretion, certain entities that provided enhanced service." *Brand X,* 125 S. Ct. at 2708. Congress did not codify that policy, so the Commission remained free to change it in response to changing circumstances. That is precisely what the agency did here.

The Commission rightly rejected the notion (*see* EarthLink Br. 22-27) that it could not modify its *Computer Inquiry* rules unless it conducted a forbearance analysis under section 10 of the Communications Act, 47 U.S.C. § 160. *Order* ¶ 81 (JA). Section 10 "comes into play only for requirements that exist; it says nothing as to what the statutory requirements are." *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 578 (D.C. Cir.) ("*USTA II*"), *cert. denied*, 543 U.S. 925 (2004). Neither Title II nor any other part of the Communications Act requires facilities-based ISPs to offer transmission on a common carrier basis. Thus, when the Commission relieved ILECs of common carriage obligations with respect to broadband Internet access transmission, it was not forbearing from any statutory requirement.

As a result of the *Order*, an ILEC may choose to offer broadband Internet access transmission on a non-common carrier basis. *See Order* ¶¶ 86-88 (JA -). Any such offering will generally be exempt from the requirements of Title II –

not because the FCC has forborne from enforcing those requirements, but because Title II applies only to common carriers.[43]

Petitioners make various attacks on the FCC's reasonable decision to eliminate its outdated *Computer Inquiry* regulations. None of these challenges has merit.

A. The Commission Reasonably Found That The Costs Of The *Computer Inquiry* Requirements Outweighed The Benefits

The record in this proceeding contained substantial evidence that the *Computer Inquiry* rules imposed significant costs on ILECs, thereby impeding innovation and investment in new broadband technologies and services. *Order* ¶¶ 65-73 (JA -). Among other things, the rules prevented ILECs from making the most efficient use of cutting-edge broadband equipment, which typically integrates telecommunications and data processing functions. To comply with their *Computer Inquiry* obligations, ILECs faced a Hobson's choice: Either they could ask equipment manufacturers to "de-integrate" the new equipment, "thereby creating unnecessary costs and service delays," or else they would have to refrain

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[43] EarthLink questions the FCC's authority to apply selected provisions of Title II to wireline broadband Internet access. Br. 25-26. It also contends that the Commission, by allowing ILECs to treat DSL transmission as "regulated activity" for cost allocation purposes, is enabling ILECs to engage in improper cross-subsidization. *Id.* at 25 (citing 47 U.S.C. § 254(k)). These claims are insubstantial. The FCC has ample authority "to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction." *Brand X*, 125 S. Ct. at 2708. Those "special regulatory duties" could include some or all of the obligations prescribed by Title II. As for the cost allocation issue, the agency explained that revised state and federal ratemaking methodologies (which no longer link phone service rates to costs) have substantially reduced the risk of cross-subsidization. *Order* ¶¶ 82-83, 133 (JA - , -).

from using the equipment's capabilities to the fullest extent, "thereby reducing their operational efficiency." *Order* ¶ 65 (JA).

EarthLink maintains (Br. 45-46) that manufacturers will readily accommodate the ILECs' need for equipment that conforms to the *Computer Inquiry* rules. Evidence in the record, however, indicated that several equipment manufacturers had "halted or decreased their DSL technology activities" because the existing regulatory environment was "retarding ... investment in new technologies." *Order* at n.194 (JA) (citing Catena Comments at 6 (JA)).

In any event, even if EarthLink is correct that manufacturers will de-integrate their broadband equipment at ILECs' request, the Commission rightly recognized that such an accommodation itself involves "obvious technological costs." *Order* ¶ 67 (JA). Manufacturers believe that they can "best respond to future consumer demands" by developing "equipment that integrates information service and transmission capabilities in a manner that allows functions to be performed at multiple points within a broadband network and closer to the end user than ever before." *Ibid.* But the *Computer Inquiry* regulations require ILECs to offer "stand-alone" telecommunications service, necessitating the "separation of telecommunications capabilities from information processing capabilities." SBC Ex Parte Letter, March 7, 2003, at 8 (JA). Those rules thus effectively "force technological development in another, less efficient direction" that is less responsive to consumers' needs. *Order* ¶ 67 (JA).

The record also showed that "compliance with the *Computer Inquiry* obligations requires costly redundant systems and duplicative processes that result

in operational inefficiencies." *Order* ¶ 68 (JA). The Commission reasonably found that the cumbersome task of ensuring regulatory compliance hampered ILECs' efforts to develop new and improved broadband services in response to consumer demand. The agency observed that Verizon "frequently must deny requests for new Internet access service capabilities because the process to accommodate them under existing *Computer Inquiry* regulations is prohibitively expensive." *Order* ¶ 71 (JA).[44]

The Commission reasonably concluded that all of "these costs, inefficiencies, and delays are significant and substantially impede network development." *Order* ¶ 71 (JA). The Commission found – and petitioners do not seriously dispute – that the costs of compliance with the *Computer Inquiry* requirements "act as an investment disincentive." *Order* ¶ 68 (JA). In the Commission's expert judgment, continued "application of the *Computer Inquiry* rules ... would prevent much ... innovation from occurring." *Order* ¶ 70 (JA).

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[44] For example, Verizon described the complications that would ensue if an ISP asked Verizon to perform end user authentication functions (such as log-in and password verification). Under the *Computer Inquiry* rules, "Verizon would be required to separately identify the underlying transmission components from other aspects of the service, such as the authentication functionality, and develop a new generic service offering that could be made available to any other requesting ISP" even if very few ISPs had any interest in such a service. Verizon Ex Parte Letter, June 26, 2003, at 4 (JA). In addition, Verizon would have to develop or modify systems "to handle ordering, billing and repair processes" for the new authentication service; and "tariffs would have to be filed" pursuant to the *Computer Inquiry* rules. *Ibid.* Understandably, these regulatory hurdles often deterred or delayed the offering of new services. *See* Verizon Carlton/Sider Supplemental Declaration ¶ 28 (JA -).

The Commission reached a similar conclusion in another proceeding when it relieved ILECs of the obligation under section 251(c)(3) to provide competing carriers with unbundled access to certain broadband network facilities. *See USTA II,* 359 F.3d at 578. The agency determined there – just as it did here – that regulation of ILECs' broadband operations created a disincentive to investment and innovation. The D.C. Circuit upheld that reasonable conclusion. *Id.* at 578-85. This Court should do likewise.[45]

In deciding whether to rescind the *Computer Inquiry* rules, the Commission did not focus solely on their costs. Instead, it compared the rules' costs with their purported benefits, and it found that changes in technological and market conditions had obviated the need for those rules. *Order* ¶ 69 (JA).

The Commission determined that the primary impetus for adopting the *Computer Inquiry* rules – concern about a "bottleneck" transmission monopoly – provided no basis for regulating the market for broadband Internet access because that market already features "[v]igorous competition between different platform

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[45] EarthLink claims (Br. 47-48) that the FCC failed to consider the economic incentives of companies other than ILECs. That is incorrect. The Commission noted that the *Computer Inquiry* rules, by mandating "a particular type of generalized wholesale offering" of transmission, "may reduce incentives for ISPs to seek alternative arrangements from other broadband Internet access platform providers and for those other providers to offer such arrangements." *Order* ¶ 63 (JA). The Commission thus reasonably expected that rescinding those rules would enhance the investment incentives of all companies in the broadband market, not just ILECs, by promoting the negotiation of "customized arrangements tailored to the particular needs of requesting ISP customers." *See Order* ¶ 72 (JA). Indeed, the record indicated that "portions of the ISP community … agree that market-based commercial arrangements will better serve the interests of ISPs, broadband providers, and consumers." *Order* ¶ 87 (JA).

providers ... in many areas." *Order* ¶ 62 (JA).[46] In the Commission's view, it made little sense to continue "[r]equiring a single type of broadband platform provider (*i.e.,* wireline) to make available its transmission on a common carriage basis" when a different transmission platform (cable) supports the broadband Internet access service with the largest market share, and when the record showed that several other transmission platforms are emerging. *Order* ¶ 79 (JA).

The Commission had good reason to believe that competition in the broadband Internet access market would only intensify over time. Technological developments have enabled several different broadband transmission platforms to emerge. *Order* ¶¶ 32-40 (JA -). The prospect of competition from these new transmission sources further diminishes the likelihood that any platform provider will dominate the market. The Commission predicted that with the proliferation of broadband-related applications of the Internet (such as streaming video), consumer demand for broadband Internet access services will increase, offering more opportunities "for alternative technologies and their respective providers ... to mount competitive challenges." *Order* ¶ 61 (JA). EarthLink thus cannot plausibly claim (Br. 43-47) that technological considerations provided no support for eliminating the *Computer Inquiry* requirements.

Because the Commission found that competition exists in the broadband Internet access market and is likely to grow, it reasoned that even if the *Computer Inquiry* requirements were eliminated, "business incentives will compel wireline

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[46] The D.C. Circuit has also found "robust competition" in the broadband Internet access market. *See United States Telecom Ass'n v. FCC*, 290 F.3d 415, 428 (D.C. Cir. 2002) ("*USTA I*"), *cert. denied*, 538 U.S. 940 (2003); *USTA II*, 359 F.3d at 582.

broadband carriers to offer broadband transmission on a commercially reasonable basis to independent ISPs" at "mutually agreeable rates, terms, and conditions." *Order* ¶ 75 (JA -). The record supported that conclusion. Qwest stated that whether or not the *Computer Inquiry* rules remained in effect, it would "continue to make available a DSL offering that will enable consumers to reach unaffiliated ISPs because consumers demand the choice, and meeting that demand makes [Qwest's] product more attractive." *Order* ¶ 74 (JA). Qwest explained that this approach made good business sense in view of consumers' "loyalty" to certain ISPs such as AOL or EarthLink: "To the extent that consumers value a particular ISP, an ILEC would risk losing significant wholesale DSL business if it refused to deal fairly with that entity." Qwest Comments at 17 (JA).

Similarly, BellSouth said that it would "benefit financially from providing DSL transmission to independent ISPs" because "it has an economic incentive to spread the costs of its network over as much traffic and as many customers as possible regardless of whether such customers are wholesale or retail." *Ibid.* The Commission found that this incentive will increase as competition from Internet telephony services begins to erode ILECs' revenues from traditional voice telephone services. When that happens, ILECs will have powerful "incentives to mitigate this potential revenue loss by retaining customers on the wireline broadband platform to the maximum extent possible" – including customers that purchase wholesale broadband transmission (such as independent ISPs). *Order* ¶ 76 (JA).

ACN questions the FCC's predictive judgment that ILECs will continue to sell wholesale broadband transmission even without a regulatory compulsion to do so. ACN Br. 33-38. But the Commission need not "be confident to a metaphysical certainty of its predictions about the future of competition in a given market before it may modify its regulatory scheme." *WorldCom, Inc. v. FCC,* 238 F.3d 449, 459 (D.C. Cir. 2001). The Commission's predictive judgments about matters within its expertise are entitled to substantial deference. *See FCC v. WNCN Listeners Guild,* 450 U.S. 582, 594-95 (1981); *FCC v. National Citizens Committee for Broadcasting,* 436 U.S. 775, 814-15 (1978). And the Commission here reasonably predicted that ILECs would continue to provide wholesale broadband transmission to competing ISPs because they would have economic incentives to maintain a substantial wholesale transmission business in the face of expanding competition in the broadband Internet access market. This sort of prediction "regarding the actions of regulated entities" is "precisely the type of policy [judgment] that courts routinely and quite correctly leave to administrative agencies." *Public Citizen, Inc. v. NHTSA,* 374 F.3d 1251, 1260-61 (D.C. Cir. 2004) (internal quotations omitted).

The record in this proceeding contained substantial evidence that the *Computer Inquiry* rules entail significant costs and yield limited benefits in the market for broadband Internet access. After careful consideration of the record, the Commission found no compelling need for continued regulation of that market. It reasonably concluded that wholesale broadband Internet access transmission would remain available on reasonable terms even if the *Computer Inquiry* regulations no longer existed. At the same time, the agency determined that the

substantial costs of those regulations were "a persuasive factor for their removal," *Order* ¶ 70 (JA), and that their elimination would increase the likelihood that "wireline network operators will take more risks in investing in and deploying new technologies than they are willing and able to take under the existing regime." *Order* ¶ 72 (JA). In the Commission's expert judgment, rescinding the *Computer Inquiry* rules for wireline broadband Internet access will best advance the agency's mandate under section 706 of the 1996 Act to "encourage the deployment of advanced telecommunications capability to all Americans by removing barriers to infrastructure investment." *Order* ¶ 78 (JA). Petitioners have given this Court no good reason to disturb that reasonable policy judgment.

B. In Making Its Assessment Of The Costs And Benefits Of Continued Regulation, The Commission Reasonably Refrained From Performing A Traditional "Market Dominance" Analysis

Petitioners' primary objections to the FCC's cost-benefit analysis in this case revolve around the issue of market power (or, in the FCC's parlance, "market dominance"). Petitioners maintain that the agency should have performed a conventional assessment of market dominance, distinguishing between specific geographic and product markets. Time Warner Br. 29-47; ACN Br. 15-33; EarthLink Br. 35-43. As the Commission rightly recognized, however, the market for broadband Internet access is not the sort of market that the FCC has typically subjected to traditional market dominance analysis.

Historically, the Commission has analyzed carriers' market dominance for purposes of deciding how much to regulate an established telecommunications

market that has begun to make the transition from an entrenched ILEC monopoly to the initial stages of competition. *Order* ¶ 84 (JA). That kind of market environment bears no resemblance to the "dynamic and evolving" market for broadband Internet access, where the Commission found that "the current market leaders, cable operators and wireline carriers, face competition not only from each other but also from other emerging broadband Internet access service providers." *Ibid.* In the Commission's considered judgment, this "rapidly changing market does not lend itself to the conclusions about market dominance" that the Commission typically makes when deciding how to regulate "well-established, relatively stable telecommunications service markets." *Ibid.*

The Commission had good reason to doubt the usefulness of static market dominance analysis in this proceeding. To date, providers of broadband services serve only 20 percent of the potential market. *Order* ¶ 51 (JA). "The 20 percent cumulative penetration rate for broadband services stands in marked contrast to" the market penetration rate for telephone voice services, which has consistently topped 90 percent for more than 20 years. *Order* ¶ 55 (JA). Because much of the broadband market remains untapped, the Commission sensibly found that it could not reliably determine "which technology or technologies will serve the majority of customers when the market reaches greater maturity." *Order* ¶ 59 (JA).

The ongoing evolution of broadband technology further complicated any attempt to make definitive judgments about market dominance in the nascent broadband market. The Commission found record evidence that alternative

broadband transmission platforms – including satellite, wireless, and power lines – are emerging to compete with cable modem service and DSL. The Commission determined that the availability of these alternative sources of broadband Internet access has already produced "increasing competition" at both the retail and wholesale levels. *Order* ¶ 50 (JA). In light of these "larger trends" in the emerging market for broadband Internet access, the Commission saw little point in trying to assess the ILECs' "market dominance" on the basis of "snapshot data that may quickly and predictably be rendered obsolete as this market continues to evolve." *Ibid.*

Furthermore, the Commission determined that the then-prevailing regulatory regime would skew any evaluation of market dominance in the wholesale broadband market. Because the *Computer Inquiry* rules had required only ILECs to offer wholesale transmission, a "traditional market dominance analysis" could yield the "misleading" and "self-fulfilling" conclusion that ILECs dominate the "dynamic and evolving" market for wholesale broadband Internet access transmission. *Order* ¶ 85 (JA).

In light of all these factors, the Commission reasonably declined to perform a traditional "market dominance" analysis to evaluate the costs and benefits of retaining the *Computer Inquiry* requirements in "an emerging market" that will likely experience "rapid technological and competitive" changes before it reaches maturity. *Order* ¶ 85 (JA). Instead, the Commission reasonably concluded that it could best promote the public interest by permitting "competitive marketplace conditions to guide the evolution of broadband Internet access service." *Ibid.* The

"public interest touchstone of the Communications Act ... permits the FCC to allow the marketplace to substitute for direct Commission regulation in appropriate circumstances." *Wold Communications, Inc. v. FCC,* 735 F.2d 1465, 1475 (D.C. Cir. 1984).

The Commission further observed that even if it had applied market dominance analysis, it would have been "highly unlikely" to find that wireline broadband Internet access providers are dominant in the retail market because cable modem service providers have a much higher market share. *Order* at n.253 (JA). ACN suggests (Br. 15-16) that ILECs' smaller market share should not have precluded a finding that ILECs have market power. But neither ACN nor any other petitioner has identified a case – and we know of none – in which the FCC has classified a carrier as "dominant" in an emerging market where the carrier's chief competitor has a 60 percent market share. *See Order* ¶ 51 (JA -).

Time Warner and ACN argue that the Commission in this case deviated from its standard practice of using market dominance analysis in similar contexts. Time Warner Br. 30-32; ACN Br. 18, 20, 22-24. But in the *Cable Modem Order* – the agency precedent most closely related to this case – the Commission also did not conduct a traditional market dominance analysis. The agency there made no express findings that cable modem service providers were non-dominant. It simply "concluded that changed market conditions warrant different treatment" of cable companies providing broadband Internet access. *Brand X,* 125 S. Ct. at 2711. In the Supreme Court's judgment, that general finding of "changed market conditions" provided "adequate rational justification" for the Commission's

decision not to apply the *Computer Inquiry* requirements to cable modem service providers. *Ibid.* If the Commission could grant this sort of regulatory relief to cable operators – the undisputed market leaders – without performing conventional "market dominance" analysis, then it plainly did not need to conduct such analysis before granting the same relief to telephone companies, which have a much smaller market share.

In any event, even assuming that the FCC's approach in this case reflected a departure from past practice, "an agency may change its course so long as it can justify its change with a 'reasoned analysis.'" *Horn v. Thoratec Corp.*, 376 F.3d 163, 179 (3d Cir. 2004) (quoting *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983)). The Commission here fully justified its decision to refrain from standard market dominance analysis in order to avoid making highly dubious and "premature" conclusions about a nascent and dynamic market that is "rapidly changing." *Order* ¶ 84 (JA).[47]

Time Warner and ACN contend that the Commission should have examined the "enterprise" market (which serves larger business customers) separately from the mass market for residential and small business customers. Time Warner Br.

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[47] In that respect, this case is distinguishable from the two cases on which Time Warner principally relies (Br. 33-36): *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004), *cert. denied*, 125 S. Ct. 2902 (2005), and *WLOS TV, Inc. v. FCC*, 932 F.2d 993 (D.C. Cir. 1991). In *Prometheus*, this Court held that the FCC did not adequately explain why it repealed a rule governing the sale of television stations. *Prometheus*, 373 F.3d at 420-21. And in *WLOS*, the D.C. Circuit ruled that the Commission "failed to explain or even recognize its departure from agency precedent" in denying an application to assign a television station license. *WLOS*, 932 F.2d at 998. Here, by contrast, the Commission reasonably explained why it declined to apply traditional market dominance analysis to the emerging and still-evolving market for broadband Internet access.

29-42; ACN Br. 17-25. They assert that the record contained evidence that ILECs exercise market dominance over broadband transmission in the enterprise market. Time Warner Br. 42-47; ACN Br. 25-33. But the same considerations that counseled against conventional market dominance analysis in this case applied to *both* the mass market and the enterprise market for wireline broadband Internet access service. Both of these "emerging" markets are "still relatively undefined," and both markets will almost certainly undergo "rapid technological and competitive" changes. *Order* ¶ 85 (JA). Therefore, just like the mass market, the Commission found that the still-evolving enterprise market for broadband Internet access is not susceptible to reliable assessments of market dominance on the basis of contemporaneous evidence "that may quickly and predictably be rendered obsolete." *Order* ¶ 50 (JA).

Moreover, as Time Warner acknowledges (Br. 30), enterprise customers demand "very different kinds of services." Unlike mass market customers, enterprise customers "frequently purchase high-capacity transmission services, such as Frame Relay, Asynchronous Transfer Mode (ATM), Gigabit Ethernet, and similar services provided via emerging technologies."[48] The Commission made clear that these services – unlike wireline broadband Internet access service – are "broadband telecommunications services" that "remain subject to current Title II requirements." *Order* ¶ 9 (JA -). Because the *Order* does not alter ILECs'

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[48] *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290, 18321-22 (¶ 57) (2005); *see also* Time Warner Reply Comments at 4 (JA) ("broadband services such as ATM and Frame Relay" are "demanded by many medium-sized and large businesses").

obligations to offer frame relay, ATM, gigabit Ethernet, and similar broadband transmission services on a common carrier basis, it seems unlikely that the *Order* will have any meaningful adverse effect on competition in the enterprise market.

EarthLink's attacks on the FCC's analysis of the mass market also miss the mark. EarthLink contends (Br. 39-40) that the FCC effectively found that a "duopoly" would provide sufficient competition to justify removal of the *Computer Inquiry* obligations. The Commission made no such finding. Recognizing the dynamic nature of the nascent market for broadband Internet access, the Commission reasonably refused to make the premature assumption that the two primary competitors in today's mass market would be the only remaining competitors when the market reached maturity. Instead, the Commission predicted that as the market evolves, providers of alternative broadband platforms (*e.g.*, satellite, wireless, and power lines) will provide additional competition for providers of DSL and cable modem service. *Order* ¶¶ 50-61 (JA -).[49]

In addition, contrary to EarthLink's assertion (Br. 40), the Commission specifically considered the "portions of the country" that are currently served by only one broadband platform. The agency reasonably projected that as consumer demand for broadband services grows, many consumers who currently have access

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[49] In the meantime, petitioners have offered no evidence that ILECs and cable operators are currently resorting to "supracompetitive pricing at monopolistic levels" when marketing high-speed Internet access to mass market customers. *Cf. FTC v. H.J. Heinz Co.*, 246 F.3d 708, 724 n.22 (D.C. Cir. 2001) (describing the potential "danger" of duopoly). To the contrary, the D.C. Circuit has repeatedly found that providers of DSL and cable modem service are engaging in "robust competition" for new customers. *See USTA I*, 290 F.3d at 428; *USTA II*, 359 F.3d at 582. And the record showed that ILECs have recently reduced their DSL rates in response to competition. *See Order* at n.167 (JA).

to only one broadband platform will have a choice of broadband Internet access providers in the future. *Order* ¶ 57 (JA).

EarthLink and ACN claim that the small market share captured thus far by alternative broadband platforms demonstrates that those platforms cannot compete effectively with cable modem service and DSL. EarthLink Br. 38-39; ACN Br. 29. But the mere "*availability* of competition" – even from companies with very small market shares – can serve to constrain a firm with a much larger market share from exercising market power. *See Time Warner Entertainment Co. v. FCC,* 240 F.3d 1126, 1134 (D.C. Cir. 2001). And in this proceeding, the Commission found that "emerging broadband platforms" such as satellite and wireless "exert competitive pressure even though they currently have relatively few subscribers compared with cable modem service" and DSL. *Order* ¶ 58 (JA). In particular, satellite and fixed wireless broadband services, which are already available in many areas, expanded their customer base from 257,000 to 422,000 subscribers in just two years (an increase of nearly 65 percent). *Ibid.* (JA).

The Commission also reasonably predicted that these alternative platforms – and others still being developed (such as broadband over power lines) – will likely win more customers over time. *Order* ¶¶ 50-61 (JA -). At least one petitioner appears to agree with the agency's forecast. According to a 2004 EarthLink press release, broadband over power lines (also known as "BPL") "has great potential to become the third broadband wire into the home."[50] Recently, EarthLink invested

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[50] EarthLink Statement on FCC Broadband Over Power Lines Ruling, October 14, 2004 (available at www.earthlink.net/about/press/pr_fcc_bpl/).

in a venture by Current Communications to deploy BPL commercially; and EarthLink's president described Current's BPL offering as "another viable alternative to the broadband services we now provide."[51]

While the Commission did not employ the sort of "market dominance" analysis that petitioners would prefer, the *Order*'s evaluation of market conditions went well beyond the market analysis that the Supreme Court found sufficient in *Brand X* to exempt cable modem service providers – the broadband market leaders – from common carrier regulation. The Commission here did more than make a general finding of "changed market conditions." *Cf. Brand X,* 125 S. Ct. at 2711. It also determined that even without the *Computer Inquiry* obligations, ILECs will have business incentives to continue offering wholesale broadband Internet access transmission on commercially reasonable terms. *Order* ¶¶ 74-76 (JA -). That reasonable assessment of this emerging market amply justified the agency's decision to lift the *Computer Inquiry* requirements for wireline broadband Internet access.

C. The Commission's Decision To Lift The *Computer Inquiry* Requirements For Wireline Broadband Internet Access Service Complied With The Service Classification Standards Set Out In *NARUC I*

The same factors that warranted the elimination of the *Computer Inquiry* requirements in this proceeding also justified the FCC's decision to give ILECs the option of providing broadband Internet access transmission service on either a

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[51] News Release, Current Communications Announces $130 Million In Investments In Broadband Over Power Line Networks, May 4, 2006 (available at www.currentgroup.com/news/releases/05-04-06_New_Investors.html).

common carrier basis (as a "telecommunications service") or a private carriage basis. In granting ILECs that choice, the Commission properly took into account the prevailing common carriage standards set out in *National Ass'n of Regulatory Utility Commissioners v. FCC,* 525 F.2d 630 (D.C. Cir.) ("*NARUC I*"), *cert. denied,* 425 U.S. 992 (1976).

NARUC I established a two-part test for distinguishing between common carriage and private carriage with respect to communications services: (1) a service will be treated as a common carrier offering if there is a "legal compulsion . . . to serve [the public] indifferently"; (2) if no such compulsion exists, a service nevertheless will be treated as common carriage if "there are reasons implicit in the nature of [the] operations to expect an indifferent holding out to the eligible user public." *NARUC I,* 525 F.2d at 642. With judicial approval, the Commission has interpreted this test "to mean that a carrier has to be regulated as a common carrier" if "'the *public interest requires* common carrier operation of the proposed facility,'" or if the carrier *voluntarily holds itself out* to "'make capacity available to the public indifferently.'" *Virgin Islands Telephone Corp. v. FCC,* 198 F.3d 921, 924 (D.C. Cir. 1999) ("*Vitelco*") (emphasis added) (quoting *Cable & Wireless, PLC,* 12 FCC Rcd 8516, 8522 (¶¶ 14-15) (1997)). The Commission applied that judicially endorsed interpretation of the *NARUC I* test in this case. *See Order* at n.108, ¶¶ 72-73, 103 (JA , - , -). Consistent with its reasonable understanding of *NARUC I,* the Commission removed the "legal compulsion" for common carriage previously imposed by the *Computer Inquiry* rules, while leaving

carriers free to incur common carrier obligations by voluntarily holding themselves out as common carriers. *Order* ¶¶ 86-95 (JA -).

Petitioners put forth various arguments that the Commission's action violates *NARUC I*, but their claims have little substance. ACN argues as a threshold matter that the statutory definition of "telecommunications service" and the *NARUC I* test are "'two tests, independent from each other,'" and that the Commission "erred in conflating the two tests" when determining whether broadband Internet access transmission services should be subject to Title II common carriage requirements. Br. 39-40 (quoting *Vitelco*, 198 F.3d at 929). But as the Commission (*Order* ¶ 103 & n.318 (JA -)), the D.C. Circuit (*Vitelco*, 198 F.3d at 922), and petitioners EarthLink (Br. 27 n.62) and Comptel (Br. 49) all recognize, the Communications Act's definition of "telecommunications service" is properly read to coincide with the *NARUC I* test for common carrier communications service. Thus, ACN's claim that the Commission *improperly* "conflated" the statutory definition with the *NARUC I* test is baseless.[52]

Petitioners also contend that the Commission misconstrued the "public interest" when it concluded that ILECs no longer should be subject to "legal compulsion" to provide broadband Internet access transmission on a common

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[52] In the language ACN quotes from *Vitelco* regarding "two tests, independent from each other," the D.C. Circuit was merely describing the analysis of the FCC staff, acting on delegated authority. *Vitelco*, 198 F.3d at 929. The court went on to note that the Commission itself, on review of the staff decision, "expressly articulated the relationship between the 1996 Act and the *NARUC I* test by stating that 'telecommunications carrier' means essentially the same as common carrier." *Ibid.* The court in *Vitelco* upheld the Commission's reasonable reading of the statute. *Id.* at 926-27.

carrier basis. EarthLink Br. 29-30, 33-34; ACN Br. 40-44. As the Supreme Court has long recognized, however, "the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference" because "the weighing of policies under the public interest standard is a task that Congress has delegated to the Commission." *FCC v. WNCN Listeners Guild*, 450 U.S. at 596 (internal quotations omitted). The public interest standard "constitutes a broad grant of discretion to the FCC." *Transportation Intelligence, Inc. v. FCC*, 336 F.3d 1058, 1064 (D.C. Cir. 2003).

Applying the broad "public interest" standard in this case, the FCC properly considered not only current market conditions, but also other statutory goals, including the congressional directive in section 706 of the 1996 Act to encourage broadband deployment. *Order* ¶¶ 77-80 (JA -). The Commission reasonably took account of the significant disincentives to broadband innovation and investment that mandatory common carriage imposed upon ILECs. *Order* ¶¶ 65-73 (JA -). By lifting common carriage obligations and permitting common carriage on a voluntary basis, the agency properly sought "to facilitate broadband deployment in the manner that best promotes wireline broadband investment and innovation, and maximizes the incentives of all providers to deploy broadband." *Order* ¶ 89 (JA). Given the reasonableness of this policy judgment, petitioners' attacks on the agency's assessment of the public interest are unavailing.

EarthLink claims that "private carriage reclassification [is] in the public interest" only when existing customers can turn to "alternative *common carrier* transmission facilities," and that the Commission violated this principle by

permitting ILECs to provide broadband transmission on a private carriage basis without any assurance that alternative common carrier services would be available. Br. 29 (emphasis added). This argument rests on the mistaken assumption that *NARUC I* invariably requires the existence of common carriage alternatives before a service may be designated as private carriage. EarthLink bases that notion on language from the D.C. Circuit's opinion in *Wold Communications*, 735 F.2d 1465, and the Commission order that *Wold* upheld (*Domestic Fixed-Satellite Transponder Sales*, 90 FCC 2d 1238, 1253-54 (¶¶ 37, 39 & n.38) (1982)). But when the D.C. Circuit stated that "a key concern" in that proceeding was the "adequacy of the remaining common carrier capacity," 735 F.2d at 1474, the court was simply affirming the reasonableness of the Commission's own analysis at the time, not establishing a test to govern future classification proceedings. Indeed, in a subsequent order, the Commission found that market forces eliminated any need to require domestic satellite licensees to provide capacity on a common carrier basis; and the agency amended its rules to permit *all* operators "to elect to operate on a common carrier or non-common carrier basis." *Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems*, 11 FCC Rcd 2429, 2436 (¶ 49) (1996).

Other FCC proceedings confirm that the Commission does not regard the availability of common carrier alternatives as a prerequisite to authorizing private carriage arrangements. For example, in *AT&T Corp.*, 14 FCC Rcd 13066 (1999) ("*Japan-U.S. Order*"), the Commission relied upon the presence of competing *non-common carrier* facilities to justify a grant of authority to operate a submarine

cable network between the United States and Japan on a private carriage basis. *Id.* at 13067-68 (¶ 1), 1380 (¶ 39 & n.56).[53] And the FCC has stated on several occasions that its "public interest analysis" under *NARUC I* need not be "limited to … reasoning" that "focused on the availability of alternative facilities."[54]

More generally, petitioners complain that the Commission failed to conduct "market power" analysis before freeing ILECs from Title II regulation in this proceeding. ACN Br. 40-44; EarthLink Br. 33-34. While the Commission declined to "make a finding of market non-dominance" regarding ILECs' provision of broadband Internet access transmission, *Order* ¶ 84 (JA), it carefully considered market conditions before deciding to eliminate common carrier obligations for this service. *Order* ¶¶ 47-76 (JA -).[55] Among other things, after considering the parties' competing analyses, the Commission found that: ILECs have never been the exclusive "bottleneck" providers of broadband

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[53] *See also Review of Commission Consideration of Applications Under the Cable Landing License Act*, 15 FCC Rcd 20789, 20817 (¶ 65) (2000) ("*Cable Landing License Notice*") ("in the *Japan-U.S. Order*, the Commission found that competing non-common carrier facilities will at least partially constrain the operations" of the proposed private carriage network).

[54] *See Japan-U.S. Order*, 14 FCC Rcd at 13080 (¶ 39); *Telefonica SAM USA, Inc.*, 15 FCC Rcd 14915, 14920 (¶ 11) (Int'l Bur. 2000); *see also Cable Landing License Notice*, 15 FCC Rcd at 20816-17 (¶ 65) (the Commission's public interest analysis under *NARUC I* need not focus exclusively on "the availability of alternative common carrier facilities").

[55] Although petitioners suggest otherwise, nothing in the statute or the agency's precedents required a finding of non-dominance prior to removing common carriage obligations. *See Domestic Fixed-Satellite Transponder Sales*, 90 FCC 2d at 1254 n.38 (the market analysis undertaken in connection with authorizing the non-common carrier sale of satellite transponders "may differ from [the non-dominance inquiry] utilized in [the FCC's] Competitive Carrier Rulemaking").

Internet access transmission, *Order* ¶ 47 (JA); "[v]igorous competition" between different platforms exists "in many areas" and is spreading, *id.* ¶ 62 (JA); "other existing and developing platforms" (such as satellite, wireless, and power lines) will likely provide broadband transmission alternatives to cable modem service and DSL, *id.* ¶ 50 (JA); and "business incentives will compel wireline broadband carriers to offer broadband transmission on a commercially reasonable basis to independent ISPs" at "mutually agreeable rates, terms, and conditions," *id.* ¶ 75 (JA). That analysis, discussed in more detail in Parts II.A and II.B of this Argument, fully satisfied any market power inquiry that may have been required under *NARUC I.*[56]

Finally, ACN and CompTel contend that the Commission also violated the second part of the *NARUC I* test, which concerns whether a carrier voluntarily offers common carriage. ACN Br. 44-47; CompTel Br. 47-51. According to ACN (Br. 46), granting ILECs the option to provide service on a non-common carrier basis fails the second part of the *NARUC I* test because ILECs – having provided

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[56] EarthLink incorrectly asserts (Br. 34) that "yet-to-be realized" platforms and "developing" technologies are "irrelevant" under *NARUC I*, and that only alternatives that are "actually available to customers" may be considered when deciding whether to authorize service on a non-common carrier basis. In fact, the Commission frequently considers prospective as well as existing competition in applying the *NARUC I* test. *See, e.g., AT&T Submarine Systems, Inc.*, 13 FCC Rcd 21585, 21590 (¶ 11) (1998) (relying in part on prospective competition that was expected to begin operations later in the year), *aff'd, Vitelco*, 198 F.3d 921; *Atlantica USA LLC*, 14 FCC Rcd 20787, 20791 (¶ 11) (Int'l Bur. 1999) (approving private carriage application in part because "there are sufficient existing and planned facilities" on the pertinent routes); *AT&T Corp.*, 13 FCC Rcd 16232, 16237 (¶ 15) (Int'l Bur. 1998) (authorization to provide service on non-common carrier basis was "predicated in part upon the current and planned facility alternatives").

the service in question on a common carrier basis "for quite some time" – can be expected to continue holding themselves out as common carriers. Similarly, CompTel argues (Br. 47) that the Commission violated *NARUC I* by "le[aving] it to the carriers to classify their own services for regulatory purposes." Both claims are baseless.

Contrary to ACN's suggestion, ILECs' past practice of providing broadband Internet access transmission on a common carrier basis says nothing about their likely future conduct, since the *Computer Inquiry* rules previously mandated common carriage. In giving carriers the option to provide such service on a private carriage basis, the Commission reasonably credited ILECs' claims that, once freed from the *Computer Inquiry* common carriage obligations, they would likely make most broadband Internet access transmission services available through individualized commercial arrangements, rather than indiscriminate offerings. *Order* ¶ 72 (JA -).

Notwithstanding CompTel's apparent assumption, the Commission did not purport to free carriers of common carriage obligations if they ultimately hold themselves out in a manner that establishes common carrier status (*i.e.*, by offering service indiscriminately). Rather, the agency gave carriers the option of providing service in a manner that would *not* create such status. *See Order* ¶¶ 89-90, 94 (JA - , -). The Commission has done the same thing – without objection – on several prior occasions. *See Order* at n.280 (JA). That approach does not violate the second part of the *NARUC I* test.

D. The Commission Complied With Section 214 When It Authorized Discontinuance Of Common Carrier Broadband Internet Access Transmission Services

Before a common carrier may cease to provide telecommunications service, it must first obtain from the FCC "a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby." 47 U.S.C. § 214(a). Pursuant to section 214, the Commission in this case granted a conditional "blanket certification" for carriers to discontinue providing common carrier broadband Internet access transmission services. *Order* ¶ 101 (JA). Under the terms of this certification, a carrier cannot discontinue service until it provides notice to affected customers and the FCC at least 30 days before terminating service. *Ibid.*[57]

EarthLink asserts (Br. 48-53) that the *Order*'s certification of discontinuance violated both section 214 and the Constitution's Due Process Clause. Because no party presented these issues to the Commission, EarthLink is precluded from raising them here. *See* 47 U.S.C. § 405 (when seeking judicial review of a Commission order, a party may not raise an issue "upon which the Commission ... has been afforded no opportunity to pass"); *Service Electric Cable TV, Inc. v. FCC*, 468 F.2d 674, 676-77 (3d Cir. 1972). Even if these claims were not procedurally barred, they lack merit.

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[57] The Commission also stated that discontinuance could not occur during a one-year transition period unless "all existing customers" of the service at issue "have transitioned to some other type of service arrangement ... during the transition period." *Order* at n.305 (JA); *see also id.* ¶ 98 (JA -).

Contrary to EarthLink's contention (Br. 49-50), the FCC properly applied its "test for determining whether a telecommunications service may be discontinued under section 214(a)." *Order* ¶ 100 (JA). The Commission reasonably found that "competition from other broadband Internet access service providers and the wireline providers' business incentives to attract ISP customers should ensure the continued availability" of broadband Internet access transmission "under reasonable rates, terms, and conditions" even if ILECs stop providing the service on a common carrier basis. *Ibid.* Consequently, the Commission determined that discontinuance of the common carrier service "would not adversely affect the present or future public convenience or necessity." *Ibid.* That finding "was supported by the record" in this proceeding "and by logic, reason, and common sense. Section 214(a) requires no more." *Lincoln Telephone & Telegraph Co. v. FCC,* 659 F.2d 1092, 1099 (D.C. Cir. 1981).

EarthLink is simply wrong if it means to suggest that section 214 prohibits a "blanket" certification. The D.C. Circuit long ago held that "the FCC may satisfy Section 214(a)'s requirement of a public interest finding through a single rulemaking proceeding" that governs multiple applications for certification: "Section 214(a) does not specify any particular procedure for making public interest determinations. And by not specifying the procedure to be employed, Congress allowed the Commission flexibility to mold its procedures to the needs of the situation." *Lincoln Telephone,* 659 F.2d at 1101; *see also* 47 U.S.C. § 154(j) ("The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."). The

Commission reasonably exercised that procedural flexibility here. Having decided to give ILECs the option to offer broadband Internet access transmission as private carriage, the agency issued a blanket certification under section 214 to ensure that ILECs could smoothly and efficiently convert their service offerings from common carriage to private carriage.[58]

There is no basis for EarthLink's claim (Br. 49) that section 214 gives "purchasers of ILEC DSL services" a "right ... to be heard and to seek redress before the agency." To be sure, section 214(b) refers to "the right to those notified to be heard." 47 U.S.C. § 214(b). Under the terms of that provision, however, "those notified" of a proposed discontinuance include only "the Secretary of Defense, the Secretary of State" (when the discontinuance involves service to foreign points), "and the Governor of each State" that would be affected by the discontinuance. *Ibid.* Section 214 says nothing about providing either notice or a hearing to individual customers that would be affected by a discontinuance.[59]

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[58] In an analogous context, the Supreme Court has held that section 7(b) of the Natural Gas Act permits the Federal Energy Regulatory Commission to issue a blanket approval of abandonment of natural gas facilities or service – an approval that "is not specific to any single abandonment but is instead general, prospective, and conditional." *Mobil Oil Exploration & Producing Southeast Inc. v. United Distribution Cos.*, 498 U.S. 211, 227 (1991) (citing 15 U.S.C. § 717f(b)).

[59] In a footnote, EarthLink asserts (Br. 52 n.135) that courts "have long recognized" that section 214(a) "establishes a right of affected parties to be heard." But the cases EarthLink cites do not support that proposition. Indeed, in one of those cases, the Second Circuit found that section 214(a) "imposes *no* procedural requirements" and "*no* requirement for a formal hearing." *ITT World Communications, Inc. v. FCC*, 595 F.2d 897, 900 & n.8 (2d Cir. 1979) (emphasis added). In another case cited by EarthLink, the D.C. Circuit observed that a different subsection of the statute – section 214(d) – alludes to "full opportunity for
(footnote continued on next page)

Unlike the statute, section 63.71 of the FCC's rules requires carriers to provide notice of a proposed discontinuance to affected customers. *See* 47 C.F.R. § 63.71(a). The *Order* did not disregard that rule, as EarthLink contends (Br. 51-52). Rather, pursuant to section 63.71, the Commission here ordered carriers to provide affected customers with prior notice of any proposed discontinuance of common carrier broadband Internet access transmission service. *Order* ¶ 101 & n.306 (JA) (citing 47 C.F.R. § 63.71(a)(1)-(4)).

Section 63.71 also contemplates that affected customers will have an opportunity to object to a proposed discontinuance. *See* 47 C.F.R. § 63.71(a)(5)(i)-(ii). The *Order* does not deprive customers of that opportunity. After receiving the advance notice mandated by the *Order*, customers facing the prospect of discontinuance may file comments with the FCC objecting to the discontinuance. Those comments could persuade the Commission to require the continued provision of common carrier transmission services in particular areas. Whenever the Commission receives notification of a discontinuance pursuant to the *Order,* it "reserves the right to take actions where appropriate under the circumstances to protect the public interest." *Order* ¶ 101 (JA).

Finally, there is no merit to EarthLink's argument that the section 214 certification in this case violated the Due Process Clause. EarthLink does not cite a single case in support of that contention – and with good reason. The case law

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(footnote continued from previous page)
hearing." *Hawaiian Telephone Co. v. FCC*, 589 F.2d 647, 654 n.13 (D.C. Cir. 1978) (quoting 47 U.S.C. § 214(d)). By its own terms, section 214(d) "applies only to situations in which the Commission orders a carrier to provide facilities." *ITT World*, 595 F.2d at 900 n.8.

makes clear that EarthLink has no legitimate constitutional claim. The Supreme Court has held that due process requirements do not apply when a private company terminates service because the Due Process Clause applies only to state action. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). "The mere fact that a business is subject to [federal] regulation does not by itself convert its action into that of the [government] for purposes of the [Fifth] Amendment." *Id.* at 350. In the context of this case, the FCC's approval of a carrier's application for discontinuance "does not transmute a practice initiated by the [carrier] and approved by the [FCC] into 'state action.'" *Id.* at 357.

In addition, this case does not implicate the sort of property interest that is protected by due process. EarthLink has no "legitimate claim of entitlement to" common carrier broadband Internet access transmission service. *See Board of Regents v. Roth,* 408 U.S. 564, 577 (1972). Neither the Communications Act nor the FCC's rules establish any such entitlement. Accordingly, due process requirements do not apply here.

CONCLUSION

The petitions for review should be denied.

Respectfully submitted,

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June 2, 2006

CERTIFICATE OF ADMISSION

Pursuant to 3rd Circuit LAR 28.3(d) and 46.1(e), I certify that I am a member of the bar of this court.

/s/ Samuel L. Feder

Samuel L. Feder

IN THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

TIME WARNER TELECOM, *ET AL.*, PETITIONERS, V. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA RESPONDENTS	)	NO. 05-4769

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7) and this Court's order dated May 31, 2006, I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 18,120 words. I further certify that the text of the E-Brief (in PDF format) and the text of the hard copies of the brief are identical. I further certify that a virus scan was performed on the electronic version using Symantec Anti-Virus Corporate Edition Version 10 and that no viruses were detected in the file.

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June 2, 2006

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Time Warner Telecom, et al., Petitioners,

v.

Federal Communications Commission & USA, Respondents.

Certificate Of Service

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